No. 8075

United States Circuit Court of Appeals

For the Ninth Circuit

COUNTY OF SAN JOAQUIN, STATE OF CALIFORNIA,

Appellant,

v.

EDWARD F. HARRIS, Receiver of the Harris Harvester Company, a corporation, et al.,

Appellee.

Opening Brief of Appellant, County of San Joaquin, State of California

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Edward F. Harris, Receiver of the Harris Harvester Company, a corporation, et al.,

Appellee.

Opening Brief of Appellant, County of San Joaquin, State of California

I.

INTRODUCTION.

(A) STATEMENT OF FACTS.

This is an appeal by the County of San Joaquin, State of California (hereinafter for convenience called the County), from an order made by the United States District Court for the Northern District of California on

January 18, 1935 in the receivership proceedings of Harris Harvester Company (hereinafter for convenience called the Company) providing for the payment of (a) a 20% dividend on the claims of the general unsecured creditors of the Harris Harvester Company; (b) certain receivership expenses; and (c) an allowance to the Receiver and his attorney; and rejecting the claim of the County for taxes, and denying its petition for the payment thereof.

The proceedings below were instituted by the Hercules Motors Corporation (an unsecured general creditor of the Harris Harvester Company) by filing a creditor's bill against said Company, on behalf of itself and all other creditors of that Company, praying for the appointment of a receiver of the property and assets of said Company (R. pp. 18-20).*

The Company having filed, in the proceeding below, its written consent to the appointment of a receiver, the Court, on March 30, 1931, granted the prayer of the creditor's bill and appointed Edward F. Harris as receiver of the property and assets of the Company (said Edward F. Harris being hereinafter for convenience called the Receiver). By said order, the Receiver was authorized to sell the Company's stock of harvesters and parts and engage in limited manufacturing operations and thereupon the Receiver qualified (R. pp. 2-3, 20-21). Pursuant to said order the Receiver has conducted limited manufacturing operations and has sold a portion of said harvesters and parts and at present is holding part of such stock for sale (R. pp. 4-9).

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* References are to the printed Record.

The lower Court by order made and entered on May 29, 1931 required the creditors of the Company to file their claims against the Company with the Receiver on or before August 31, 1931, and provided that notice of such order should be given by publication and by mailing copies thereof to all known creditors of the Company. Notice of said order was published and copies mailed as required by said order (R. pp. 21-22). The Receiver on September 12, 1934 filed his petition requesting permission to pay a twenty per cent dividend on unsecured merchandise claims against the Company arising prior to receivership, in the aggregate amount of $43,344.82, and on claims for commissions against the Company arising prior to receivership in the aggregate amount of $2,814.99 (R. pp. 22-23).

Thereafter, and on September 21, 1934, F. C. Mitchell, as the surviving partner of the copartnership of F. C. Mitchell and G. H. Harris, filed in the proceedings below a claim against the Receiver in the amount of $8,807.72 for labor and materials furnished the Receiver. No claim had been theretofore filed by F. C. Mitchell for such labor and materials furnished (R. pp. 23-27). On November 5, 1934 the petition of the Receiver for the payment of said dividends, the claim of said F. C. Mitchell, and the matter of the allowance of fees to the Receiver and his attorneys, came on for hearing.

The County, on November 3, 1934, presented to the Receiver and at said hearing asked leave to file with the Court, a verified claim, viz.: (1) Against the Company and its receivership estate for personal property taxes assessed by the County against the Company in the amount of $8,735.93,

together with interest, covering taxes for the fiscal year 1929-30 in the amount of $2,488.07, for the fiscal year 1930-31 in the amount of $2,511.20, and for the fiscal year 1931-32 in the amount of $2,541.48; and (2) Against the Receiver for personal property taxes assessed by the County against him in the amount of $5,368.48, together with interest, covering taxes for the period from March 31, 1931 to June 30, 1933 in the amount of $4,364.46, for the fiscal year 1933-34 in the amount of $763.22, and for the fiscal year 1934-35 in the amount of $240.80 (R. pp. 27-37).

The County petitioned the Court for the payment of its claim for taxes against the Company in the aggregate amount of $8,735.93, together with interest, from the receivership assets prior to the payment therefrom of the claims of general creditors of the Company and for the payment of taxes against the Receiver in the amount of $5,368.48, together with interest, from the receivership assets prior to the payment therefrom of the claims of general creditors and all other receivership expenses, excepting only judicial costs.

At the hearing the Court declined to permit the County to file its claim and stated that it would take the matter under submission upon the filing of briefs by the County and the Receiver.

The Court on January 18, 1935, made and entered its order (which is the order here appealed from), (1) authorizing the payment of a twenty per cent dividend on said unsecured merchandise claims in the aggregate sum of $43,344.82 and said commissions in the aggregate sum of $2,814.99; (2) allowing to the Receiver the sum of $1500 for services rendered and to his attorneys the sum of $750; (3) rejecting the claim of the County for taxes and deny-

ing its petition for the payment thereof; (4) providing for the payment to F. C. Mitchell on the receivership claim hereinabove referred to of the sum of $5,899.07; and (5) denying and disallowing the participation of certain other claims in the twenty per cent dividend (R. pp. 48-54).

The lower Court by said order rejected and disallowed in toto the claim of the County and ordered the payment of certain receivership expenses (including expenses other than judicial costs) and the distribution of a dividend to general creditors of the Company without providing for any distribution or payment whatsoever upon either the claim of the County against the Company for taxes arising prior to receivership or the claim of the County against the Receiver for taxes accruing during the receivership.

The following facts pertinent to this appeal appeared from the evidence presented at said hearing and from papers on file in the proceedings below:

> The Board of Supervisors of the County passed and adopted a resolution on October 8, 1934 setting forth that there was not sufficient real property to secure the payment of said delinquent personal property taxes covered by said claims and authorizing and directing the district attorney of the County to institute suits therefor and to take any other action or proceeding (including the filing of claims in the receivership proceeding below) for the collection of said personal property taxes (R. pp. 42-44).
>
> The Company owned certain real property situate in the County of San Joaquin, State of California, upon which its plant was situate and against which

the County asserted a lien for the payment of the personal property taxes covered by its said claim.

The Company, in 1929, acquired from The Harris Manufacturing Company (its predecessor in interest) all of the assets of the latter company, including its real property, plant and equipment, and in consideration therefor assumed all the obligations of said The Harris Manufacturing Company.

Said real property and certain personal property were subject to the lien of a Bond Indenture of The Harris Manufacturing Company which was executed and recorded in 1922. The American Trust Company, as successor Trustee under the Bond Indenture, with the permission of the lower court, sold the property covered thereby at Trustee's sale on February 24, 1934 to F. K. Woll and M. D. Clelland for the sum of $5,000, and said F. K. Woll and M. D. Clelland turned in to the Trustee at said Trustee's sale, as a credit toward said purchase price, $99,500 principal amount of the bonds out of an aggregate of $102,500 principal amount of the bonds then secured and outstanding under the Bond Indenture. Said F. K. Woll and M. D. Clelland purchased said property on behalf of the Bondholders' Protective Committee, and said $99,500 principal amount of bonds were deposited with and held by said Committee (R. pp. 29-32).

(B) SPECIFICATION OF ERRORS RELIED UPON.

1. The Court erred in making the following findings:—

(a) "the claim of said County of San Joaquin for taxes is without merit either as a preferred or general claim * * * ." (Asgmt. of Errors I, R. p. 58.)

(b) "the bondholders on whose behalf a claim has been presented by American Trust Company have through foreclosure proceedings acquired title to the plant and equipment of said defendant and the real estate upon which it is located, at a nominal price, and for a sum greatly less than the actual value thereof at the time of such foreclosure; * * *" ASGMT OF ERRORS II, R. p. 58.

(c) "the time for presenting claims herein, as previously determined by order of this Court herein, expired on August 31, 1931." (Asgmt. of Errors III, R. p. 58.)

(d) "the dividend recommended by the Receiver and herein approved is the full and equitable exercise of discretion on the part of said Receiver and this Court and the conduct of the business under said receivership; * * *." (Asgmt. of Errors IV, R. p. 59.)

2. The Court erred in rejecting the claim of the County for the payment of taxes, denying its petition for the payment thereof and denying to the County the right to file in the proceedings below its claim for the payment of taxes. (Asgmt. of Errors V, VI, and VII, R. p. 59.)

3. The Court erred in providing for the payment of a dividend on the merchandise claims or the commissions arising prior to the receivership without likewise providing for the payment of a like dividend upon the claim of the County against the Company for personal property taxes, together with interest thereon, as provided by law, and the claim of the County against the Receiver herein for personal property taxes, together with interest thereon, as provided by law and each of such tax claims, with interest thereon as allowed by law. (Asgmt. of Errors XII, XIII and XIV, R. pp. 60-61.)

4. The Court erred in ordering the Receiver to pay the claim of F. C. Mitchell, without providing for the like payment of the claim of the County against the Receiver for personal property taxes, together with interest thereon, as provided by law. (Asgmt. of Errors XVII, R. p. 63).

5. The Court erred in providing for the payment of a dividend on the merchandise claims or the commissions arising prior to the receivership, without first having provided for the payment in full of said claim of the County against the Company for personal property taxes, together with interest thereon, as provided by law. (Asgmt. of Errors XXI and XXII, R. pp. 64-65).

6. The Court erred in providing for the payment of the claim of F. C. Mitchell, or a dividend on the merchandise claims or on the commissions arising prior to the receivership, without first having provided for the payment in full of the claim of the County against the Receiver for personal property taxes, together with interest thereon, as provided by law. (Asgmt. of Errors XXI, XXIII and XXVI, R. pp. 64, 66).

(C) OUTLINE OF ARGUMENT.

The County in this brief will show:

First: That its claim for taxes against the Company, which were assessed and became due prior to the institution of the receivership proceedings, is an obligation of the Company, and that the County is entitled, by virtue of prerogative right, to the payment of such taxes from the

receivership assets prior to the payment therefrom of the claims of the general creditors. (Point II, Br. pp. 10 to 21.)

Second: That its claim for taxes which accrued during the receivership proceedings, constitutes a valid claim against the Receiver and is properly assessable to him and must be paid by him out of the receivership assets prior to the payment of both the claims of general creditors and of other receivership expenses, excepting only judicial costs.* (Point III, Br. pp. 21 to 29.)

Third: That no portion of its claim for taxes is barred by the statute of limitations or by the bar order of the Court requiring claims to be filed with the Receiver on or prior to August 31, 1931. (Point IV, Br. pp. 30 to 43.)

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* As above set forth the claim of the County was (1) against the Company and its receivership estate for personal property taxes for the years 1929-30, 1930-31 and 1931-32, and (2) against the Receiver for personal property taxes accruing from and after March 30, 1931. Therefore, the claims in part cover the same taxes, i.e., the portion of the 1930-31 taxes which accrued after the institution of the receivership proceedings and the 1931-32 taxes. There is some question whether the 1931-32 taxes were properly included in the County's claim against the Company since the same did not become due until after the institution of the receivership proceedings though they became a lien prior to such time. However, it is respectfully submitted that the County is entitled to collect the portion of the 1930-31 taxes accruing after the institution of the receivership proceedings on either its claim against the Company and its receivership estate or its claim against the Receiver. It appears to be well settled that a Receiver is obligated to pay taxes which accrue during the receivership as a receivership expense, irrespective of the time when such taxes became due.

See:

Atlantic Trust Co. v. Dana (C. C. A. 8, 1903), 128 Fed. 209, 230;

Prudential Ins. Co. v. Lieberdar Holding Corporation (C. C. A. 2, 1934), 74 Fed.(2d) 50, 52.

II.

THE COUNTY HAS A PERSONAL CLAIM AGAINST THE COMPANY FOR THE TAXES ASSESSED PRIOR TO THE RECEIVERSHIP, AND, BY VIRTUE OF THE COUNTY'S PREROGATIVE RIGHT, SUCH TAXES MUST BE PAID FROM THE RECEIVERSHIP ASSETS PRIOR TO THE PAYMENT THEREFROM OF THE CLAIMS OF GENERAL CREDITORS.

(A) THE TAXES ASSESSED PRIOR TO RECEIVERSHIP ARE A PERSONAL OBLIGATION OF THE COMPANY.

It is well established that under the California statutes a taxpayer is personally obligated to pay county personal property taxes assessed against him and that the county may sue to enforce this obligation. This personal liability is imposed by three different statutory provisions in the California law, viz., (1) California Political Code Section 3716, (2) Stats. 1880, Chap. 123 (Deering's General Laws 1931, Act 8455), and (3) Stats. 1903, Chap. 119, as amended (Deering's General Laws 1931, Act 8471).

Political Code Section 3716.

Political Code Section 3716 provides, in part:

> "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; * * *"

It has been held by the California Supreme Court that this Political Code Section imposes a personal obligation on the taxpayer for taxes assessed against him.

The concurring opinion of Justice Thornton in the case of *San Francisco Gas Co. v. Brickwedel* (1882), 62 Cal. 641, holds that Section 3716 imposed a personal liability on the taxpayer to pay taxes assessed against him and in view thereof, the amount of certain city taxes assessed against him could be used as an offset by the city against any claim he had against it. In this connection, Justice Thornton, in his concurring opinion, stated (p. 645):

> "The view above taken is sustained by section 3716 of the Political Code, which is as follows: 'Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid, or the property sold for the payment thereof.' The law here creates the personal obligation to pay, and to pay a sum certain and fixed by lawful authority. These, i. e., the personal obligation and the certainty of the sum, are the most striking characteristics of a debt."

See, also:

People v. Seymour (1860), 16 Cal. 332, 343;

Fresno Investment Co. v. Brandon (1926), 79 Cal. App. 387, 389, 249 Pac. 548.

Furthermore, it would appear that in California the obligation of the taxpayer to pay personal property taxes assessed against him exists independently of statute.

The California Supreme Court, in the case of *City of Oakland v. Whipple* (1870), 39 Cal. 112, apparently holds,

without reliance upon any statute, that a taxpayer is personally obligated to pay personal property taxes assessed against him and that the state or its political subdivisions may sue the taxpayer therefor. The Court stated (p. 115):

> "We can perceive no foundation for the argument that this was intended to be the exclusive remedy. Instead of abridging the ordinary remedy by suit for the collection of the delinquent tax, it was clearly intended to afford a new, summary, effectual and additional method for collecting it, in order to prevent the owner from evading the payment of it by a removal of the property. If a tax has been duly assessed, the owner of the property becomes personally liable for it, and the remedy is not confined to a seizure and sale of it, nor to the enforcement of a lien upon it by action. (People v. Seymour, 16 Cal. 332)."

See, also:

City of St. Louis v. United Rys. Co. (Tex. 1914), 263 Mo. 387, 174 S. W. 78, 94 (writ of error dism. 241 U. S. 647, 60 L. Ed. 1220, 36 S. Ct. 550).

Stats. 1880, Chap. 123.

Stats. 1880, Chap. 123, provides that a county may sue for delinquent taxes in its own name, whether the same be for county or state purposes, and sets forth a form of complaint to be used in such suits.

The California courts hold that this statute imposes a personal obligation on the taxpayer to pay the taxes as-

sessed against him and authorizes the enforcement of the obligation by suit.

> *Los Angeles v. Ballerino* (1893), 99 Cal. 593, 32 Pac. 581;
> *City of Los Angeles v. Glassell* (1906), 4 Cal. App. 43, 87 Pac. 241;
> *County of Sacramento v. C. P. R. R. Co.* (1882), 61 Cal. 250, 253;
> *Lantz v. Fishburn* (1911) 17 Cal. App. 583, 588, 120 Pac. 1068.

In the case of *People v. Seymour* (Oct. Term, 1860), 16 Cal. 332, the Court held that under Stats. 1860, Chap. 172 (which was similar to the Statute of 1880) the County of Sacramento was entitled to sue in the name of the people for the collection of personal property taxes. In that connection the Court said (p. 343):

> "It is thus seen that the tax upon property is as well a personal charge as a charge upon the property. The statute, it is true, requires an assessment, but it may be well doubted if this be the foundation of the duty, or anything more than a means of enforcing or collecting the tax."

Stats. 1903, Chap. 119.

Stats. 1903, Chap. 119, as amended, provides that a county may sue to enforce the obligation to pay delinquent personal property taxes "where in the judgment of the board of supervisors there is not sufficient real property to secure the payment of such personal property taxes." The act further provides that the remedy given thereby shall not be deemed exclusive.

The board of supervisors of the County having found that there was not sufficient real property to secure the payment of the taxes (Br. p. 5), the right of the County to sue and to enforce its claim for the taxes against the receivership estate of the Company under the Act of 1903, can not be questioned by the Court on the ground that taxes are adequately secured by real property. It is well established by the California decisions that the findings of tax-collecting officials that personal property taxes are not adequately secured are conclusive.

In *County of San Mateo v. Maloney* (1886), 71 Cal. 205, 12 Pac. 53, the Court, in so holding, stated (p. 208):

> "But the law authorized the assessor to ascertain and determine whether the real property was sufficient to secure payment of the taxes upon the real and personal property, and if, 'in his opinion,' it was not, the law cast upon him the imperative duty of enforcing collection of the taxes against the personal property. That duty was regularly performed by the assessor (Code Civ. Proc., sec. 1963, subd. 15), and the judgment or opinion which he formed, and upon which he acted, is not reviewable by the courts after he has collected and paid over the taxes to the county treasurer. It is well settled that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. (Gaines v. Thompson, 7 Wall. 347.) As was said in *Porter v. Haight*, 45 Cal. 639: 'When the state, by legislative act, confers upon a board of public officers jurisdiction to exercise their judgment and discretion upon matters within their

power to perform, the courts cannot review the question whether that discretion was properly exercised.' (See also People v. Hagar, 52 Cal. 179.)"

See, also:

Getchell v. Walker (Ore. 1929), 129 Ore. 602, 278 Pac. 93.

Furthermore, it is well settled that the federal courts are bound by the decisions of the state court respecting the enforcement of local taxes.

In *Lewis v. Monson* (1894), 151 U. S. 545, 38 L. Ed. 265, 14 S. Ct. 424, the Court, in commenting upon this rule, stated (151 U. S. 549):

"No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the state for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the nonpayment of taxes, and the form and efficacy of the tax deed, are all subjects which the state has power to prescribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

It therefore appears that by virtue of each of the three statutory provisions above referred to (viz., Pol. Code,

Sec. 3716, Stats. 1880, Chap. 123, and Stats. 1903, Chap. 119, the Company is personally obligated to pay the claim for taxes assessed prior to receivership.

(B) THE COUNTY, BY PREROGATIVE RIGHT, IS ENTITLED TO THE PRIOR PAYMENT OF THE TAXES ASSESSED BEFORE THE INSTITUTION OF THE RECEIVERSHIP PROCEEDINGS.

It is well established at common law that the state and its political subdivisions are entitled, by way of prerogative right, to the prior payment of their claims for taxes (Marshall v. New York (1920), 254 U. S. 380, 65 L. Ed. 315, 41 S. Ct. 143). The California courts have recognized that, independent of statute, the claim of a county for taxes assessed by it is entitled to priority.

In *Dougherty v. Henarie* (1873), 47 Cal. 9, the Court stated (p. 14):

> "The necessity of collecting revenue for the support of the Government imperatively requires that the lien for taxes shall take precedence over all other liens."

See, also:

Woodill & Hulse Electric Co. v. Young (1919), 180 Cal. 667, 182 Pac. 422.

This Court, in the case of *Pauley v. State of California* (C. C. A. 9, 1934), 75 F.(2d) 120, recognized that in California the state was entitled, as a prerogative right, to the prior payment in receivership proceedings of its claim for motor vehicle fuel taxes. This Court reached its con-

clusion on the basis of California Political Code Section 4468, which provides:

> "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state."

In the case of *Adair v. Beverly Hills Petroleum Corporation* (D. C. Cal. S. D. 1932), 59 Fed.(2d) 94, the Court recognized that under said Political Code section the County was entitled, as a prerogative right, to the payment of personal property taxes arising before receivership and held that such taxes must be paid out of the assets of the receivership estate prior to the claims of general creditors. It was there said (p. 96):

> "Section 4468 of the Political Code of the state of California declares: 'The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, is the rule of decision in all the courts of this state.'
>
> "The doctrine announced in the case of Marshall v. New York, supra, is neither repugnant to nor inconsistent with the Constitution or the laws of California, and we are unable to perceive why that doctrine is not equally applicable to this state."

(C) THE COURT IS REQUIRED TO RECOGNIZE THE PREROGATIVE RIGHT OF THE COUNTY CONFERRED BY STATE LAW AND MUST PROVIDE FOR THE PAYMENT OF THE TAXES FROM THE RECEIVERSHIP ESTATE PRIOR TO THE PAYMENT THEREFROM OF THE CLAIMS OF GENERAL CREDITORS.

It is well established that the federal courts are bound by the local law conferring on the state and its political subdivisions a prerogative right for the collection of taxes and in recognition of such right are required to provide for the payment from the receivership assets of taxes arising before receivership prior to the payment therefrom of the claims of general creditors.

The United States Supreme Court, in the case of *Marshall v. New York,* supra, stated the rule as follows (254 U. S. 385):

> "The priority of the state extends to all property of the debtor within its borders, whether the debtor be a resident or a nonresident, and whether the property be in his possession or in custodia legis. The priority is, therefore, enforceable against the property in the hands of a receiver appointed by a Federal court within the state. (Citations omitted). For a receiver appointed by a Federal court takes property subject to all liens, priorities, or privileges existing or accruing under the laws of the state."

In *Liberty Mut. Ins. Co. v. Johnson Shipyards Corporation* (C. C. A. 2, 1925), 6 Fed.(2d) 752 (aff'd 269 U. S. 503, 70 L. Ed. 379, 46 S. Ct. 182), the Court said (p. 756):

> "It has frequently been pointed out that a tax lawfully imposed is not to be regarded as an ordinary

debt, but is an obligation which is to be regarded as paramount to all other demands, although the law imposing the tax does not expressly provide that it is to have priority. These cases proceed upon the theory that the maintenance of the government and the public welfare are so dependent upon the collection of taxes that payment should have precedence over all other claims; and it is thought that taxes levied for the support of government are founded upon a higher obligation than other demands. See State of Minnesota v. Central Trust Co., 94 F. 244, 247, 248, 36 C. C. A. 214, and cases there cited.

"The courts have sustained in numerous cases the right to priority of payment of taxes over all other claims."

See, also, *Board of Com'rs of Sweetwater County v. Bernardin* (C. C. A. 10, 1934), 74 Fed.(2d) 809 (cert. den. 295, U. S. 731, 79 L. Ed. 1680, 55 S. Ct. 645), where the Court stated (p. 814):

"The court properly held that the gross product tax assessed on coal produced prior to the receivership and the taxes on personal property assessed in 1930 prior to the receivership, the lien for which is inferior to the first mortgage, should be paid prior to any distribution to unsecured creditors out of any funds, monies or properties not subject to the lien of the first mortgage."

In *Greeley v. Provident Sav. Bank* (Mo. 1889), 98 Mo. 458, 11 S. W. 980, it was said:

"It may be conceded that the state did not have an express lien upon the assets that went into the hands

of the receiver, but it had a right, paramount to other creditors, to be paid out of those assets. (Sess. Acts 1881, p. 180, Sec. 7; Id. p. 35; State v. Rowse, 49 Mo. 586;) a right which it could have enforced through its revenue officers by the summary process of distress, (Rev. St. 1879, Sec. 6754), but for the fact that the property and assets of its debtor had passed into the custody of its courts, whose duty it was, in the administration and distribution of those assets, to respect that paramount right, upon the untrammeled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it, and to make no order for the distribution of assets *in custodia legis,* except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors, and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt, and be cut off unless presented to the court for allowance within a given time."

Marshall v. New York, supra;

City of New Orleans v. Malone (C. C. A. 5, 1926), 12 Fed. (2d) 17;

26 *R. C. L.* 390 (Taxation, Sec. 348).

In view of these authorities, it follows that the taxes (for the years 1929-1930 and 1930-1931) which were assessed prior to the institution of the receivership proceed-

ings are a personal claim against the Company, and that the County, by virtue of the prerogative right conferred upon it by local law, is entitled to have such taxes paid out of the receivership assets prior to the payment therefrom of the claims of general creditors.

We now pass to a consideration of the taxes which accrued during the receivership.

III.

THE TAXES ACCRUING DURING RECEIVERSHIP ARE ASSESSABLE TO THE RECEIVER AS A RECEIVERSHIP EXPENSE AND MUST BE PAID BY HIM OUT OF RECEIVERSHIP ASSETS PRIOR TO THE PAYMENT THEREFROM OF BOTH THE CLAIMS OF GENERAL CREDITORS AND RECEIVERSHIP EXPENSES, EXCEPTING ONLY JUDICIAL COSTS.

(A) THE TAXES ACCRUING DURING RECEIVERSHIP ARE ASSESSABLE TO THE RECEIVER AND MUST BE PAID BY HIM.

The universal rule that taxes accruing during receivership are assessable to the receiver and must be paid by him is incorporated into the California law by the provisions of California Political Code Section 3647, which provides:

> "Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

This Political Code provision has been recognized and applied in both the United States Supreme Court and the Supreme Court of the State of California.

In *Spring Valley Water Co. v. City and County of San Francisco* (1918), 246 U. S. 391, 62 L. Ed. 790, 38 S. Ct. 356, the Court said (246 U. S. 394):

> "1. That the assessment was authorized by the following section of the Political Code of California we think is clear:
>
> > " 'Section 3647. Property and money in litigation. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court.'
>
> "Without following and directly answering the argument advanced to sustain the contrary view, we content ourselves with a summary statement of the reasons for our conclusion. Words cannot make clearer than does the language of the text the purpose of the section to tax property or money in litigation in the hands of a court. Indeed the Supreme Court of California has so construed the section. Los Angeles v. Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770; Bessolo v. City of Los Angeles, 169 Pac. (Cal.) 372. It is further manifest that the taxation of the money deposited in the injunction suits was what was sought to be accomplished by the assessment which was made. The money assessed was in litigation, was in the custody of the court and was by its direction placed in the bank in a special account subject to the control of the court. Moreover the as-

sessment to the bank which held the money for the court was a direct compliance with the terms of the section, the description 'receiver' being employed in the statute not in a technical sense but as embracing any person acting as agent or depository of funds for a court. To give to the word the narrower meaning contended for would defeat the obvious and adjudged purpose of the statute."

Los Angeles v. Los Angeles City Water Co. (1902), 137 Cal. 699, 70 Pac. 770.

This rule, that taxes accruing during receivership are assessable to the receiver and must be paid by him is recognized universally, independently of statutory provision. The authorities hold that since the receiver and the receivership estate are enjoying the protection of the government where the estate is situate, the receiver must pay the taxes levied against the property in the receivership estate.

In the case of *In Re Tyler* (1893), 149 U. S. 164, 37 L. Ed. 689, 13 S. Ct. 785, the Supreme Court thus stated the rule (149 U. S. 182):

"The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis,* and that unauthorized interference with such possession is punishable as a contempt, is conceded, but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly, property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatso-

ever, except judicial costs, when the property is rightfully in the custody of the law; but this does not justify a physical invasion of such custody, and a wanton disregard of the orders of the court in respect of it. * * *

"The levy of a tax warrant, like the levy of an ordinary *fieri facias,* sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and, while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done, and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty,—an assumption carrying a contempt upon its face."

See, also:

Hardee v. American Security & Trust Co. (C. A. D. C. 1935), 77 Fed.(2d) 382 (cert. den. 80 L. Ed. Adv. Op. 109, 56 S. Ct. 110);

Midland Guaranty & Trust Co. v. Douglas County (C. C. A. 8, 1914), 217 Fed. 358, 362;

Board of Com'rs of Sweetwater County v. Bernardin, supra.

This obligation of the Receiver to pay taxes accruing during receivership exists irrespective of whether a personal obligation or a lien for the taxes is imposed by statute.

In *Bear River Paper & Bag Co. v. City of Petoskey* (C. C. A. 6, 1917), 241 Fed. 53, the Court stated (p. 57):

> "We think it unnecessary to decide the question of lien. These taxes were owing to the state, the county, and the city as the consideration for governmental benefits enjoyed by this property and this business during three years. The property has been in possession of the receivers, and the business has been conducted by them. It is not claimed that any other tax has been assessed in this state against them, or against the property, or against the mortgagor, or mortgagee, or mortgage bondholders. It might have been assessed against the receivers, for C. L. sec. 3837 (6), says:
>
> > " 'Personal property mortgaged or pledged shall be deemed the property of the person in possession thereof, and may be assessed to him.'
>
> "It is not claimed that the taxes are unjust or in any way inequitable. Under these conditions, and even if it were to be assumed that the taxes had not become a lien against the property, or that, through the mistake of the assessing officers, no enforceable debt against the receivers had arisen, a due regard for the rightful burdens of all citizens and residents toward the state government, and a due recognition of benefits received should impel a federal court to direct its receiver to make payment. Such payment, in the absence of a meritorious objection to the tax, we regard as the receiver's clear duty; and so it has been held, in substance, if not specifically. In re Tyler, 149 U. S. 164, 187, 13 Sup. Ct. 785, 37 L. Ed. 689; Coy v. Title Co. (C. C. A. 9) 220 Fed. 90, 92, 135 C. C. A. 658, L. R. A. 1915E, 211."

In *Coy v. Title Guaranty & Trust Co.* (C. C. A. 9, 1915), 220 Fed. 90, this Court thus stated the rule (220 Fed. 92):

> "And whether or not such taxes (taxes assessed during the receivership proceedings) be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected."

(B) TAXES ACCRUING DURING RECEIVERSHIP ARE A RECEIVERSHIP EXPENSE AND ENTITLED TO PRIORITY.

The rule that taxes accruing during receivership are a receivership expense is laid down as follows in 53 *C. J.* 231 (Receivers, Sec. 387), viz.:

> "Taxes assessed after the appointment of a receiver may properly be allowed as part of the costs and expenses of the receivership."

The following authorities, among numerous others, announce the rule that the taxes accruing during receivership are a receivership expense and must be paid from the receivership assets prior to the payment therefrom of the claims of general creditors and of receivership expenses, excepting only judicial costs:

In *Michigan v. Michigan Trust Co.* (1932), 286 U. S. 334, 76 L. Ed. 1136, 52 S. Ct. 512, Mr. Justice Cardozo, speaking for the Court, said (286 U. S. 344):

"Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and therefore charges to be satisfied in preference to the claims of general creditors. * * *

"If the receivership were to be viewed as equivalent to one for the liquidation of the business, the result would not be different, and this for the reason, without considering any other, that it was not such a receivership when the suit was instituted." (Italics ours.)

In *Piedmont Corp. v. Gainesville, etc. R. Co.* (D. C. Ga. (1929), 30 F.(2d) 525, the Court thus stated the general rule (p. 528):

> "I do not think the greater debt holders, including Piedmont Corporation and its affiliated interests, the trustee in the mortgage and the United States with their priority, could thus for four years, under the guise of a protective receivership, operate this property in hopes of its financial rehabilitation, under the protection of the state and through use of the franchise granted by it, and yet refuse to permit payment of the annual taxes meanwhile. But for the possession of this court the State could each year have forced payment, and it seems wholly inequitable for the court now to refuse it. *As litigants in equity both the mortgagee and the United States ought to yield their priorities to taxes as a necessary expense of administration* * * *" (Italics ours.)

In *Hardee v. American Security & Trust Co.* (C. A. D. C. 1935), 77 Fed.(2d) 382 (cert. den. 80 L. Ed. Adv. Op. 109, 56 S. Ct. 110), it was said (p. 384):

"In our opinion it was the duty of the receiver, while in possession of the property, to pay the taxes upon it from the rents collected by him. * * * In the present case such taxes, when properly considered, were expenses of the receivership, and fall within the provision of section 5238, Rev. St. (12 U. S. C. A. sec. 196) which states that 'all expenses of any receivership shall be paid out of the assets of such association (bank) before distribution of the proceeds thereof.' In section 64a of the Bankruptcy Act of 1898, section 104(a), tit. 11, U. S. C. A., it is said: 'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors.' In the case of In re Tyler, 149 U. S. 164, 187, 13 S. Ct. 785, 791, 37 L. Ed. 689, Mr. Chief Justice Fuller spoke for the court, saying that it is the 'imperative duty of the court to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue.' * * *

"In our opinion these principles apply to the taxes involved in the present case. The receiver collected the rents from the property while it was subject to his control. From the proceeds he rightly paid the ordinary operating expenses of the property. It was equally his duty to pay the taxes upon the property as they accrued, for these were expenses of operation or management of the trust. This duty was imposed upon the receiver in the interest and service of the government as well as by the proper management and control of the assets of the estate. It is

clear that if the receiver had made sale of the property the taxes would have been the first charge upon the proceeds of the sale, but, notwithstanding that the receiver did not make the sale, the taxes nevertheless were the first charge upon the rents which he had collected from the property."

See also:

Kansas City, Mo. v. Johnson (C. C. A. 8, 1934), 70 F.(2d) 360, (cert. den. 293 U. S. 617, 79 L. Ed. 706, 55 S. Ct. 208);

In Re Tyler (1893), 149 U. S. 164, 37 L. Ed. 689, 13 S. Ct. 785.

The taxes covered by the claim of the County against the Receiver were assessed on personal property belonging to the receivership estate and it must therefore follow in view of these authorities that the taxes of the County are assessable to the Receiver and must be paid by him and are a receivership expense entitled to priority over all claims and receivership expenses, other than judicial costs.

IV.

THE CLAIM OF THE COUNTY FOR TAXES FOR THE YEARS 1929-1930 AND 1930-1931 IS NOT BARRED BY THE STATUTE OF LIMITATIONS OR BY THE BAR ORDER OF MAY 29, 1931.

(A) PRELIMINARY STATEMENT. NEITHER THE BAR ORDER NOR THE STATUTE OF LIMITATIONS APPLIES TO THE CLAIM FOR TAXES FOR THE YEAR 1931-1932 AND SUBSEQUENT YEARS.

Before considering the applicability of the statute of limitations and the bar order (i. e., the order made by the lower Court on May 29, 1931, requiring the presentation to the Receiver of claims against the Company on or prior to August 31, 1931, Br. p. 3) to the taxes for the years 1929-1930 and 1930-1931, we will show briefly that neither the statute of limitations nor the bar order can affect the taxes for the year 1931-1932 and subsequent years.

It appears beyond dispute that the statute of limitations did not run on taxes for the year 1931-1932 and subsequent years since the claim for the taxes was presented to the Receiver (viz., on November 3, 1934, see Br. p. 3), prior to the expiration of the three year statutory period. (See California Code of Civil Procedure, Secs. 345, 338 (1)).

> *Los Angeles v. Ballerino* (1893), 99 Cal. 593, 34 Pac. 581;
>
> *San Francisco v. Luning* (1887), 73 Cal. 610, 15 Pac. 311.

The earliest of these taxes to fall due were the 1931-1932 taxes which became delinquent on December 5, 1931 (California Political Code, Section 3746), and therefore the statute did not commence to run on any of the taxes here under consideration until December 5, 1931, it being

well established that the statute does not commence to run on a suit for taxes until they become delinquent.

Cooley on Taxation (4th Ed.), Vol. III, p. 2640, Sec. 1338;

State v. Fleming (Mo. 1918), 204 S.W. 1085, 275 Mo. 509;

Rice v. State (Tex. 1929), 20 S.W. (2d) 1085, 1087;

Harrington v. Glidden (Mass. 1901), 61 N. E. 54, 179 Mass. 486. (aff'd 189 U.S. 255, 47 L. Ed. 798, 23 S. Ct. 574);

Pierce County v. Merrill (Wash. 1898), 52 Pac. 854, 19 Wash. 175.

Since the claim for the taxes was presented to the Receiver prior to the expiration of the statutory period, the statute of limitations does not affect them, it being well settled that the presentation of the claim with a receiver stops the running of the statute.

Commissioner of Insurance v. Bristol Mut. L. Ins. Co. (Mass. 1932), 181 N. E. 208, 279 Mass. 325;

St. Louis Union Trust Co. v. St. Louis & S. F. Ry. Co. (Tex. 1912), 146 S.W. 348;

Potts v. St. Paul Athletic Park Ass'n (Minn. 1901), 87 N.W. 604, 84 Minn. 217;

Lacey v. Newcomb (Iowa, 1895), 63 N. W. 704, 95 Iowa 287;

St. Louis Union Trust Co. v. Missouri Pac. Ry. Co. (Tex. 1912), 146 S.W. 346.

Furthermore, the taxes for the year 1931-1932 and subsequent years were obligations of the Receiver (see

Br. p. 21, et seq.). And, since it is well established that a receiver cannot be sued without leave of the court appointing him

> 53 *C. J.* 331 (Receivers, Sec. 545);
> *Merryweather v. United States* (C. C. A. 9, 1926), 12 Fed.(2d) 407;
> *Porter v. Sabin* (1893), 149 U. S. 473, 13 S. Ct. 1008, 37 L. Ed. 815;
> *Murray v. Etchepare* (1901), 132 Cal. 286, 64 Pac. 282,

the statute cannot be deemed to run during such immunity as it is a well-settled rule that the statute of limitations does not run upon rights of action which are enjoined.

> *California Code of Civil Procedure,* Sec. 356;
> *Wolf v. Gall* (1916), 174 Cal. 140, 162 Pac. 115;
> *American Engineer. Co. v. Metropolitan By-Products Co.* (C. C. A. 2, 1920), 267 Fed. 90 (cert. den. 254 U. S. 640, 65 L. Ed. 452, 41 S. Ct. 13).

See also, Note, 21 *A. L. R.* 961.

It is also clear that the bar order did not affect the taxes for the year 1931-1932 and subsequent years. The taxes for these years, as above set forth, were claims against the Receiver and not claims against the Company (Br. p. 21, et seq.). The bar order by its terms only provided for the filing of the claims of creditors of the Company (Br. p. 3), and therefore could not apply to taxes for the year 1931-1932 and subsequent years.

Obviously if the claim of F. C. Mitchell for materials and labor furnished the Receiver (which was not filed

until September 21, 1934, Br. p. 3) was not affected by the bar order, the County likewise was not precluded by such order from filing its claim for personal property taxes for the fiscal year 1931-1932 and subsequent years which was likewise a receivership claim.

We now pass to a consideration of the effect of the statute of limitations and the bar order on the taxes for the years 1929-1930 and 1930-1931.*

(B) THE INSTITUTION OF RECEIVERSHIP PROCEEDINGS HAS TOLLED THE RUNNING OF THE STATUTE OF LIMITATIONS ON THE CLAIM FOR TAXES FOR THE YEARS 1929-1930 AND 1930-1931.

As above set forth (see Br. p. 30), the California courts have held the three-year statutory period fixed by Section 338 (1) of the California Code of Civil Procedure is applicable to the suit for taxes and it is conceded that unless the running of the three-year statutory period fixed by said section has been tolled, the claim of the County for the taxes for the years 1929-1930 and 1930-1931 as a personal obligation of the Company was barred prior to the filing of the claim. However, it is well established under the authorities that a receivership (such as the present receivership proceedings, see Br. p. 2) for the administration of the assets of a corporation in receivership tolls the running of the statute and since the three-year statute had not run at the time

* Of course, the argument set forth under points (B) and (C) below apply to the taxes for the year 1931-1932 and subsequent years as well as the taxes for the years 1929-1930 and 1930-1931.

of the institution of the receivership proceedings, viz., March 26, 1931, the claim of the County for taxes for the years 1929-1930 and 1930-1931 is not barred by the statute of limitations. While some of the authorities have taken the position that the appointment of a receiver in an action such as a foreclosure action does not toll the running of the statute of limitations, nevertheless it is well established that where a receiver is appointed (as here) in proceedings instituted by a creditor on behalf of itself and other creditors as a class, and for the purpose of administering the assets and conducting the business of the corporation that the appointment of such receiver tolls the running of the statute of limitations during the pendency of the receivership proceedings. This rule is thus stated in 37 *C. J.* 1044 (Limitation of Actions, Sec. 452), viz.:

> "As a general rule the mere appointment of a receiver does not in any way affect the running of the statute of limitations. But where the receiver is appointed to take charge of an estate for the purpose of administering it, as for instance the settlement of the affairs of a partnership and the payment of firm debts, the statute being substantially for the benefit of all the creditors, in analogy to an ordinary creditors' bill, the running of the statute of limitations is suspended in equity against claims by firm creditors for the payment of partnership debts out of the assets in the receiver's hands. The appointment of a receiver for the final winding up of the estate of a dissolved corporation is within the same reason, and whether a debt sought to be proved against a corporation for which a receiver has been appointed is or is not barred by time depends upon

its status at the date of the decree sequestrating the assets of the corporation."

In the case of *Kirkpatrick v. McElroy* (N. J. 1886), 7 Atl. 647, 41 N. J. Eq. 539, the court said (p. 649):

> "As a general rule, the mere appointment of a receiver to take charge of property in dispute will not suspend the operation of the statute, (Anon., 2 Atk. 15;) nor will it interrupt the possession of a stranger so as to prevent the statute conferring title on him, or suspend the running of the statute against a stranger, (Harrisson v. Duignan, 2 Dru. & War. 295; Kerr, Rec. 172.) But where the receiver is appointed to take charge of an estate for the purpose of administering it, as, for instance, the settlement of the affairs of a partnership and the payment of firm debts, the suit being substantially for the benefit of all the creditors, in analogy with an ordinary creditors' bill, the appointment of a receiver with such powers will suspend the running of the statute (Sterndale v. Hankinson, 1 Sim. 393, 398; Wrixon v. Vize, 3 Dru. & War. 104;) and the lapse of time before proceeding against the receiver in the court by which he was appointed will be regarded only on the question whether the creditor has been guilty of laches in delaying the prosecution of his demand."

In the case of *McCormick v. Puritan Coal Mining Co.* (C. C. A. 3, 1928), 28 Fed.(2d) 331 (cert. den. 278 U. S. 651, 73 L. Ed. 562, 49 S. Ct. 176), the Court said (p. 332):

> "The assets of the coal mining company were taken into the custody of a court of equity through its receivers upon a creditor's bill for its preservation for the benefit of all of its creditors, and, if the

statute of limitation between creditors claiming their proportion of the insolvent trust estate on the ground that the period of limitation had expired since the trust was created were applied, it would conflict with long and well-established doctrines to the contrary. The general rule of equity, which has been sustained in that class of cases where an insolvent debtor's property has come into the custody of the court to be distributed under equitable principles for the cestuis que trustent, is that the rights of all parties are fixed as of the time when the property was taken into the custody of the court. Heckert's Appeal, 24 Pa. 482; McClintock's Appeal, 29 Pa. 360; Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 7 A. 647."

See, also:

Note, 21 *A. L. R.* 961;

State v. State Bank (Kan. 1911), 84 Kan. 366, 114 Pac. 381;

Haas v. Sinaloa Exploration & Development Co. (Del. 1930), 17 Ch. (Del.) 253, 152 At. 216;

Buss Mach. Works v. Watsontown Door & Sash Co. (D. C. Pa. 1933), 2 Fed. Supp. 758;

McGinnis v. Corporation Funding & Finance Co. (D. C. Pa. 1925), 8 Fed.(2d) 532.

In view of these authorities it would follow that the running of the statute of limitations on the claim for the 1929-1930 and 1930-1931 taxes was tolled by the institution of the receivership proceedings below.

(C) THE CLAIM FOR TAXES FOR THE YEARS 1929-1930 AND 1930-1931 IS NOT FORECLOSED BY THE BAR ORDER.

It is respectfully submitted that on two separate and distinct grounds it must be held that the claim of the County in the instant case for taxes is not affected by the bar order, viz.: (1) the County was not named in the bar order and by reason thereof it is not subject thereto since it is well established that a governmental agency is not subject to a bar order given in a receivership proceeding unless expressly named therein, and (2) conceding, solely for the purposes of the argument, that the County was subject to the bar order, nevertheless it is not affected thereby since it presented its claim for taxes prior to the distribution of the assets to the general creditors, and it is well established that the bar order irrespective of its terms affects only creditors who have failed to file their claims prior to distribution. We will discuss these two grounds in support of our position in the order named.

(1) The order fixing the time for the filing of claims did not apply to the claim for taxes, since the County was not named therein.

As above set forth (Br. p. 3) the order merely directed the creditors of the Company to file their *claims against the Company* within the time specified. The bar order did not expressly name the County or any other governmental agency. While it is conceded that if a bar order expressly names a governmental agency and such governmental agency fails to file its claim prior to distribution, it is foreclosed from demanding payment of its claim from the receiver (*People of the State of New York v. Irving Trust Company* (1933), 288 U. S. 329, 77 L. Ed.

815, 53 S. Ct. 389), nevertheless it is well settled that a governmental agency is only subject to the bar order if it is expressly named therein. The authorities, in reaching this conclusion, apparently base their position on the general proposition that a governmental agency is not subject to statutes or orders of court unless it is expressly made so by the terms of the statute or order.

This rule is stated in 53 *C. J.*, p. 238 (Receivers, Sec. 394), as follows:

> "The paramount right of the state to preference in the payment of a tax claim cannot be cut off by an order of the court fixing the time for the filing of claims. A claim by the United States for taxes is not barred by laches in asserting the claim in state receivership proceedings, and it may be presented at any time during the pendency of the receivership proceedings and before the assets are distributed; however, in receivership proceedings in a federal court, a claim of the United States for taxes, not timely filed, is not a provable claim, provided the order names the United States."

In the case of *Phelan v. Middle States Oil Corporation* (D. C. Tex., 1926), 15 Fed.(2d) 88, the Court in holding that the United States could file a claim for taxes after the time limited by the bar order had expired, said (p. 89):

> "At the request of the United States the return of the property and the payment of the claims have been delayed from time to time at an added expense to the estate. It may be conceded that the United States was not named in the bar order; that the United States appears in its capacity as a sovereign for the

> collection of public revenues. It may also be conceded that an order which does not name the United States, like a statute which does not name the United States, will not bind them."

In the case of *Reinecke v. General Combustion Co.* (1925), 237 Ill. App. 404, the Court, in laying down the rule that the United States was not affected by the bar order issued in the receivership proceedings, in which it was not named, relied upon the holding of the United States Supreme Court in the case of *United States v. Nashville, C. & St. L. Ry. Co.* (1886), 118 U. S. 120, 30 L. ed. 81, 6 S. Ct. 1006, where the Court said (118 U. S. 125):

> "It is settled beyond doubt or controversy—upon the foundation of the great principles of public policy applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."

See, also, Note, 53 *A. L. R.* 572;

Greeley v. Provident Sav. Bank (Mo. 1889), 98 Mo. 458, 11 S. W. 980;

Villere v. United States (C. C. A. 8, 1927), 18 Fed.-(2d) 409 (cert. den. 275 U. S. 532, 72 L. ed. 410, 48 S. Ct. 29);

United States v. Whisenant (Tex. 1934), 75 S. W.(2d) 958.

In view of the above authorities, it follows that since the County was not expressly named in the bar order it is not subject thereto.

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(2) The claim of the County for taxes, having been presented prior to any distribution to creditors, is not foreclosed by the bar order.

As above set forth, the County presented its claim to the Court for the payment of taxes at the time of the hearing of the recommendations of the Receiver for the payment of a dividend to creditors (Br. p. 3). Prior to the presentation of the County's claim no distribution had been made to the general creditors by the Receiver. It is well established by the authorities that the sole purpose of a bar order is to protect a receiver in distributing the assets in his hands to creditors, who have filed their claims prior to such distribution, against the claims of creditors who have failed to file their claims prior to such distribution. In short, a bar order acts as an estoppel in favor of a receiver who has distributed assets in the receivership estate to creditors, and against creditors affected thereby who have failed to file their claims prior to such distribution. However, it is well established that a creditor, who fails to file his claim within the time fixed by the bar order but nevertheless files his claim prior to the distribution (as here) is entitled to the payment of his claim notwithstanding the terms of the bar order. This rule is particularly applicable to claims for taxes. This rule is set forth in 53 *C. J.*, p. 237 (Receivers, Sec. 394), where it is said:

> "In general, where an order is given for the proposition of a notice of a limitation of the time to file claims, and such notice is duly published, claims not filed within the time specified in the notice are precluded in that proceeding from sharing in the assets. This result is held to follow, however, only where there has been, in the meantime, a final distribution of the funds in the hands of the receiver, based upon claims proven, unless injustice would otherwise be done."

The Court, in commenting upon this rule in *Employers' Liability Assur. Corp. v. Astoria Mahogany Co.* (C. C. A. 2, 1925), 6 F.(2d) 945, said (p. 946):

> "Orders of foreclosure are primarily intended for no more than safety in distribution. In this regard they are like the early orders of the same kind of the English Court of Chancery in the administration of a decedent's estate. Gillespi v. Alexander, 3 Russell, 130, 136. They enable the receivers to dispose of the property, but not to forfeit the rights even of dilatory creditors. That delay may be enough we do not deny, but certainly not unless the result of allowing the claim is to destroy intermediate interests, arising on the faith of creditors' inaction. In the case at bar we find none such."

In the case of *People v. Hopkins* (C. C. A. 2, 1927), 18 Fed.(2d) 731, the Court said (p. 732):

> "As there explained, (*Employers' Liability Assur. Corporation v. Astoria Mahogany Co.,* 6 Fed.(2d) 945 (C. C. A. 2) the effect of such so-called bar order is merely to protect the receiver in making distribution without regard to possible claims of creditors who

have failed to file them. If, before distribution is actually made, a creditor appears and satisfies the court that he is justly entitled to share in the assets on hand, his delay in presenting the claim should not bar him unless some one has been injuriously misled thereby. See People v. Security Ins. Co., 79 N. Y. 267. The mere disappointment of the receiver or of other creditors or of the promoters of a reorganization plan in finding that an unexpected claim exists is not sufficient reason to exclude the tardy claimant. *Particularly should this be true with respect to taxes. The assets are still in custodia legis and should bear their share of the public dues despite the state's delay in asserting its claim."* (Italics ours.)

See, also,

In Re Morgenstern & Co. (C. C. A. 2, 1932), 57 Fed.-(2d) 163;

In Re Studebaker-Wulff Rubber Co. (D. C. N. D. Ohio, W. D. 1929), 33 Fed.(2d) 1004.

From the above authorities it follows that, even though it be conceded for the purposes of the argument that the County was subject to the bar order (though not expressly named therein), the County is not foreclosed under the bar order from demanding the payment of its claim for taxes even though it failed to file the same within the time fixed by the bar order, since it filed such claim prior to distribution.

It is therefore respectfully submitted that the order appealed from should be reversed; that the appellant should be permitted to file its claims for payment of taxes;

and that such claims for taxes should be paid as preferred claims.

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